1929-1930

Native Appeal And Divorce Court

(Cape And O.F.S.)

v. 1-2

SELECTION OF CASES

DECIDED IN THE

NATIVE APPEAL AND DIVORCE COURT

(CAPE AND ORANGE FREE STATE DIVISION)

DURING THE YEAR

1929.

With Table of Cases and Alphabetical Index.

VOLUME I. + II.

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ALPHABETICAL LIST OF LITIGANTS.

SUBJECT INDEX.

SELECTION OF CASES

DECIDED IN THE

NATIVE APPEAL AND DIVORCE COURT

(CAPE AND ORANGE FREE STATE DIVISION, 1929).

NOSAMSI v. QINISILE.

(Butterworth.)

1929. *May* 7. Before J. M. Young, President, G. D. S Campbell and W. F. C. Trollip, Members.

Widows.—Rights of.

Facts: Appeal from the Native Commissioner's Court, Idutywa. The defendant (appellant), shortly after the death of her husband, removed from his kraal taking with her the minor children, including the heir and all the property in the estate, without in any way consulting the guardian of any other member of her husband's family.

Held: It is a well established principle of native custom that a widow may not remove the estate property out of the control and supervision of the guardian without his consent. It is the duty of the guardian to maintain her and other members of the family out of the estate as long as she continues to reside at her late husband's kraal or some other place approved of by him. If he fails she has her remedy.

It has been argued in this case that, inasmuch as the heir accompanied her, she was acting within her rights. The heir, being a minor, the fact that he left his father's kraal with the defendant, does not alter the position.

In the opinion of this Court no good grounds have been advanced to justify the action of the defendant.

The appeal is dismissed with costs.

(Umtata.)

1929. *May* 14. Before J. M. Young, President, W. J. Davidson and O. M. Blakeway, Members.

Pound regulations.—Section 77.

Facts: Appeal from the Native Commissioner's Court, Nqanduli. On Monday, the 17th December, 1928, three calves, the property of appellant, were found trespassing in respondent's lands. He took them to the appellant's kraal and notified his wife of the trespass. He was informed by her that appellant was in his lands, whereupon he left the calves with appellant's wife, notifying her that he was not parting with the possession of them and proceeded in search of the appellant.

Not finding him in his lands he proceeded to Kambi's kraal where a beer-drink was in progress. Appellant was there and no damages being demanded from him, respondent was told not to bother him while he was drinking. Respondent thereupon returned to appellant's kraal, drove off the calves and impounded them.

It has been contended on behalf of the appellant that the respondent's action in leaving the calves at appellant's kraal with his wife amounted to an abandonment of them, and, that having lost control of them, he acted wrongfully in driving them to the pound.

Held: Sec. 77 of the Pound Regulations requires the proprietor of the lands traspassed upon to take the trespassing stock or notify the trespass to the owner when known, and the said owner being in the same or an adjoining location, or immediate neighbourhood. . . . .

In the opinion of this Court the mere fact that respondent left the calves in the care of the appellant's wife, whilst he went in search of the appellant, cannot in the circumstances be construed as an abandonment of his rightful possession or control. He appears to have made it quite clear to her that he was leaving them with her temporarily while he proceeded to the lands, where he was informed that her husband would be found, with the intention of notifying him of the trespass. The cases quoted by the appellant's attorney in support of his contention are clearly distinguishable.

The appeal is dismissed with costs.

(Umtata.)

1929. *May* 16. Before J. M. Young, President, W. J. Davidson and O. Blakeway, Members.

Kraalhead, responsibility of.—Torts committed by inmates.

Facts: Appeal from the Native Commissioner's Court, Umtata. Further facts appear from the judgment.

Held: The defendants were sued in the Native Commissioner's Court for the sum of £25 as damages for adultery, followed by pregnancy, alleged to have been committed by first defendant with plaintiff's wife. There was no appearance on behalf of the first defendant and default judgment was entered against him. The second defendant denied that the first defendant was an inmate of his kraal and that he was liable for torts committed by him.

The first defendant is a son and the second defendant a grandson of the Right hand house of the late Sihuma. It is common cause that the homestead site on which the second defendant lives is registered in the name of his grandmother, the widow of the Right hand house of Simuma, and that the second defendant is the heir of Sihuma and head of his Right hand house. As head of that house, he would be liable for the torts of every inmate of that kraal no matter whether the site on which the homestead is erected is registered in the name of his grandmother or in his own name.

It is quite clear from the provisions of sec. 23, sub-sec. (*k*) of Proclamation No. 227 of 1898, as amended by Proclamation Nos. 16 of 1905 and 213 of 1913 that, where an allotment is acquired by a woman by virtue of her status as a wife or widow at her late husband's kraal, the incidence of native custom in regard to succession to that allotment is not affected, and, in the opinion of this Court, the fact that such allotment is registered in the name of the wife or widow does not relieve the kraalhead of his responsibilities and obligations.

It has been argued that as the first defendant is an uncle of the second defendant and several years his senior, the latter should not be held responsible for the torts of the former. This contention cannot be sustained. The age or relationship of the inmates are factors which do not interfere with the application of the custom.

The Additional Native Commissioner has gone very carefully into the facts of the case and the various authorities on the question of kraalhead responsibility and this Court is satisfied that his judgment is a correct one.

The appeal is dismissed with costs.

SEMARU MNUKWA v. MAKHOATLAPISI TAU.

(Kokstad.)

1929. *May* 23. Before J. M. Young, President, F. E. H. Guthrie and F. N. Doran, Members.

Land, right to occupy arable allotment.—Cancellation of Proclamation No. 143 *of* 1919.

Facts: Appeal from the Native Commissioner's Court, Mount Fletcher. Further facts appear from the judgment.

Judgment: In this case the plaintiff claimed from the defendant the sum of £6 as damages, which it is alleged he had suffered by reason of the trespass of 38 head of cattle on his arable allotment in the Thokoane Location in the Mount Fletcher district. The defendant denied the trespass and that the plaintiff was in lawful occupation of the allotment on which such trespass is alleged to have taken place.

The defendant was at one time a resident of the Thokoane Location and was the holder of the allotment in question before the taking effect of Proclamation No. 195 of 1908 and in continuous occupation of it until his removal about four years ago. Sec. 9 (1) (*b*) of Proclamation No. 143 of 1919 provides that "the right to occupy arable allotments shall be liable to be cancelled and the allotment to revert to commonage upon the removal of the allotment holder from the location." Sec. 9 (5) lays down that "cancellation and reversion to commonage unless otherwise provided for in these regulations, shall take effect from the date of entry of the same in the land register."

In this case there is no evidence to show that the requirements of the Proclamation were complied with or that the plaintiff's right to occupy the allotment has been cancelled.

The appeal is allowed with costs, the Native Commissioner's judgment set aside and the case returned to him to enable either party to lead such further evidence as may be available.

(Umtata.)

1929. *May* 15. Before J. M. Young, President, W. J. Davidson and O. M. Blakeway, Members.

Default judgment, rescission of.—Order appealable.—Time, extension of in order to appeal.

Facts: Appeal from the Native Commissioner's Court, Ngqeleni.

Judgment: On the 15th October, 1928, responded issued a summons calling upon applicant to enter appearance at 10 a.m. on Monday, 22nd October, 1928. The messenger's return shows that this summons was served on the applicant on Monday, the 23rd of October, 1928. No appearance was entered either by him or on his behalf and, on the 6th of November, 1928, default judgment was applied for and granted.

On the 22nd of January, 1929, a warrant of execution was issued and on the 12th of February an application was made in the Native Commissioner's Court for an extension of time in which to apply for a rescission of the default judgment. The application was refused.

No appeal was lodged against the order of the Native Commissioner refusing to grant the application, but the applicant now petitions this Court for an order extending the time to enable him to note an appeal against the default judgment of the 6th November, 1928, or to grant him such alternative relief as to the Court may seem meet. This petition is dated the 25th of February, 1929.

In the opinion of this Court the order of the Native Commissioner refusing the extension of time in which to enable the applicant to apply for the rescission of the default judgment, was in the circumstances final and definitive and, therefore, appealable.

It would seem then that the applicant's remedy was to appeal against the order. As the time prescribed for the noting of such an appeal has now elapsed, the only relief which this Court can afford him is to extend the time to enable him to do so, and as the matter is one in which relief is desirable, it is ordered that the applicant be granted an extension of time up to 12 noon on the 20th June, 1929, in which to note his appeal. The costs of this application to be borne by him.

(KOKSTAD.)

1929. *May* 21. Before J. M. YOUNG, President, F. E. H. GUTHRIE and F. N. DORAN, Members.

Basuto custom.—Dowry claimable after death of wife.

FACTS: Disclosed by judgment.

JUDGMENT: The questions for decision in this case are two-fold, viz.: (1) Whether under Basuto custom the balance of dowry is claimable after the death of a wife. (2) Whether the evidence supports the Native Commissioner's judgment.

With regard to the first of these questions, the union having subsisted for several years and children having been born, this Court is of opinion that, under Basuto custom, the balance of the customary dowry can be sued for.

Dealing with the second question, there is ample evidence to support the Native Commissioner's finding.

It appears that, during the appellant's absence at work, two persons were empowered to act as his agents, both of whom gave evidence at the trial. One of them supported the appellant and the other the respondent. The Commissioner believed the latter and rejected the evidence of the former, and no sufficient ground has been advanced to satisfy this Court that he was wrong in doing so.

The appeal is dismissed with costs.

(N.B.—It was argued on behalf of appellant that the admission of his agent as to the number of dowry stock received by him on behalf of his principal is binding on the principal, seeing that the agent's authority to act was not questioned.)

(KOKSTAD.)

1929. *May* 21. Before J. M. YOUNG, President, F. N. DORAN and F. E. H. GUTHRIE, Members.

Defamation.—When actionable under native custom.

FACTS: Appeal from the Native Commissioner's Court, Matatiele. In this case the plaintiff claimed from the defendant £15 as damages for defamation. The evidence adduced on behalf of plaintiff discloses that plaintiff and defendant's wife attended a beer drink at the kraal of their sub-headman; that plaintiff and two other men were requested by the sub-headman to accompany the defendant's wife, who was under the influence of beer, to her home; that about 7 p.m., it being dark at the time, when plaintiff and the woman were about ten paces from the kraal, defendant appeared, and in the hearing of the sub-headman and others said in the Xosa language: "I have been wondering where my wife was. It is you who is sleeping with my wife. I have caught you." . . . . or words to that effect.

No evidence was led by defendant, who at the close of the plaintiff's case applied for absolution from the instance. This was refused. The case was then postponed, at the instance of defendant's attorney, but at the resumed hearing no evidence was called and defendant's case was closed. Judgment was then entered for plaintiff for £5 damages and costs. Against this judgment an appeal is brought.

JUDGMENT: In the opinion of this Court the words uttered are not actionable, having regard to all the circumstances of the case. The parties are natives, and the defendant, when he found his wife after dark in the company of another man under circumstances which would convey to the native mind that there was intimacy between them, acted in conformity with the usual native practice. The appeal is allowed with costs and the Native Commissioner's judgment altered to judgment for defendant with costs.

(KOKSTAD.)

1929. *May* 23. Before J. M. YOUNG, President, F. E. H. GUTHRIE and F. N. DORAN, Members.

Estate.—Apportionment of through magistrate.

FACTS: Appeal from the Native Commissioner's Court, Tabankulu. The late Gobeni, father of the parties, who, at the time was an inmate of a leper institution, caused a communication to be addressed to the magistrate of Tabankulu by the Superintendent, wherein he apportioned his estate and requested that members of his family be called to the office of the magistrate in order that his wishes should be explained to them.

JUDGMENT: The sole question for decision is whether this communication can be regarded as a valid apportionment of his estate by the late Gobeni.

The communication requests the magistrate to call together certain members of the family and in their presence make known his wishes. This was duly done. It is obvious that, being confined in the Institution, he could not have called the members of the family together at his own kraal, and he took the only other course open to him at the time.

In the opinion of this Court the apportionment was, in the circumstances, a valid one, and a sufficient compliance with the custom.

The appeal is dismissed with costs.

MAQOSHA MBULUNGWANA v. KOKANI MBULUNGWANA.

(LUSIKISIKI.)

1929. *August* 13. Before J. M. YOUNG, President, R. H. WILSON and F. C. PINKERTON, Members.

Nqutu or Sidwangu beast.—Spoliation of.

FACTS: Appeal from the Native Commissioner's Court, Tabankulu. Further facts appear from the judgment.

JUDGMENT: In this case it is abundantly clear that the ox, value whereof is claimed, was spoliated and slaughtered by the women of the appellant's kraal.

The appellant's contention that is was paid as a fine for the abduction and seduction is not supported by the evidence, nor do the circumstances under which it was dealt with lead to any other conclusion than that it was taken as a Nqutu or Sidwangu beast. If it was handed over voluntarily by respondent, it is difficult to understand his action in reporting the matter to the headman and taking immediate steps to claim its value. Furthermore, it is unusual for a fine other than the Nqutu or Sidwangu beast to be demanded and slaughtered by the women.

It is true that the Nqutu custom is not generally observed in Pondoland, but instances of its being followed are not unknown.

In the case of *Mehlonane* v. *Nkwatsha*, 1 N.A.C. 33, the President stated that the Nqutu beast "cannot be taken by force or surreptitiously on the same ground that no other legal right may be so enforced."

This Court concurs with this statement. The appeal is dismissed with costs."

NOZULU NGEXO v. NGUNGUNYEKA TSHOPO.

(LUSIKISIKI.)

1929. *August* 13. Before J. M. YOUNG, President, R. H. WILSON and H. M. NOURSE, Members.

Amasi beast.—Disposal of.

FACTS: Appeal from the Native Commissioner's Court, Flagstaff. The plaintiff sued the defendant for nine head of cattle, or their value, the sum of £45, and alleged that sometime before East Coast fever, his sister, the defendant's wife, acquired a heifer which, with its increase, she gave to him, that from time to time he removed four head of the increase, and that defendant still has nine in his possession which he refuses to deliver to him.

The defendant denies that the heifer and its increase were given to plaintiff and says that whatever animals were removed by plaintiff were paid to him as dowry for his sister, defendant's wife.

From the evidence for the plaintiff it appears that defendant's wife was given a goat by her husband as an " amasi beast "; that this goat was not slaughtered in accordance with custom and that with its increase a heifer was acquired and the animals now claimed are the progeny of this heifer.

JUDGMENT: The Native Assessors having been consulted, state: The " amasi beast " is an animal given by the husband or father-in-law to the wife or daughter-in-law, to be slaughtered to enable her to drink the milk of her husband's kraal. If the animal is not slaughtered it remains the property of the husband or father-in-law, as the case may be, and cannot be disposed of by the wife or daughter-in-law."

This Court concurs in this expression of opinion. The appeal is allowed with costs, and the Native Commissioner's judgment altered to judgment for defendant with costs.

MLONDLENI v. MAGCAKA.

(KOKSTÅD.)

1929. *August* 19. Before J. M. YOUNG, President, H. E. GRANT and E. G. LONSDALE, Members.

Tort.—Husband's liability for.—Common law.—Applicability of.

FACTS: Appeal from the Native Commissioner's Court, Mount Frere. Defendant was sued in his capacity as husband and guardian of his wife for £60 as damages for assault committed by his wife on plaintiff. In his plea he admitted his wfe's conviction, but denied that as husband and guardian he was liable for damages arising out of the criminal action. The Native Commissioner gave judgment for plaintiff.

Against this defendant appealed on the grounds: (1)That under native law no action for damages for assault lies; (2) that a a husband is not personally liable for his wife's tort.

JUDGMENT: It is clear from the record that the action is not based on native law but on the common law; and although the parties are natives, there is nothing to prevent them availing themselves of the remedies provided by that law. In *Klette* v. *Pfitze* (6 E.D.C., p, 138), BARRY, J.P., said: "I think that if the wife had been sued assisted by her husband, the declaration would have been good; but I also think that the defendant ought to have been sued in his capacity as husband, in community to the wife, who is said to have uttered the slander. This is the law as stated by *Voet* (2.13.4), which seems to require that not only the name of the plaintiff and defendant must be expressed, but also the capacity of any one who sues or is sued by virtue of the marital right over his wife. It also appears from *Van der Linden* that the husband may be sued *Nomine Uxoris*."

The relationship which subsists between husband and wife when the union has been contracted according to native customary forms varies somewhat from that which follows a marriage in community of property. The latter creates a partnership between husband and wife, under the sole administration of the husband, in all property belonging to either of them before the marriage or coming to either during the marriage, until the date of its dissolution. Under the former no such partnership is created. The wife's possession is assimilated to that of a child and, with certain exceptions, she cannot hold property, either in her own right or in partnership with her husband.

In *January* v. *Kilpatrick* (2 E.D.C. 18), BARRY, J.P., said: "The question before the Court is, whether there is any liability upon the appellant, January, as father of Mbi, for the neglect of his son . . . . clearly, I think the father is not liable. If Mbi had been negligent or guilty of a tort, his father, if he could have been sued at all, could only have been sued as his son's guardian, and not so as to make him personally liable."

The reasons for judgment furnished by the Native Commissioner leave no room for doubt that he intended to make the husband personally liable. This being so, the appellant has adopted the correct course in coming to this Court for redress.

The appeal is allowed with costs and the judgment of the court below altered to judgment for plaintiff for the sum of £12 and costs, against Mlondleni, only in his capacity as husband and guardian of Magcina.

(Lusikisiki.)

1929. *August* 13. Before J. M. Young, President, R. H. Wilson, and F. C. Pinkerton.

Wives, ranking of.—Pondo and Tembu custom.

Facts: Appeal from the Native Commissioner's Court, Ngqeleni. Further facts appear from the judgment.

Held: In this case the respondent claimed an order declaring him to be the heir of the late Matilose in his Great house.

It is common cause (*a*) that Matilose contracted customary unions with at least three women in the following order: (1) Magcina; (2) Magingqi; (3) Mayobe; (*b*) that Magcina, the Great wife bore several daughters all of whom, with one exception, died and that there was no male issue in her house; (*c*) that respondent is the son of Magingqi, the Right hand wife, and heir of the Right hand house; (*b*) that appellant is the only son of Mayobe, the third wife.

Respondent contends that there being no male issue in the Great house and he being the eldest son of the second or Right hand house, is in native law, the heir of the Great house. Appellant, on the other hand, asserts that when the union of his father and mother Mayobe was entered into, it was understood and publicly announced that she, Mayobe, was not the third or Qadi wife, but was the "womb" or "seed-raiser" of the first or Great house, and that being so, he, appellant, is a son of the Great house, and heir to the property of that house.

In the ordinary sequence of things the first woman with whom a customary union is contracted is the Great wife, the second the Right hand wife, and the third the "Qadi" of the Great house; and, in default of male issue in the Great house, the eldest son of the Right hand house would, according to Pondo custom, succeed to the property of the Great house.

Four years ago a similar claim was brought by respondent against his father, the late Matilose, and the judgment was one of absolution from the instance. The record of that case, which was heard by the same judicial officer who dealt with the present case, was put in and certain additional evidence was taken.

The events narrated in the evidence took place very many years ago and the Native Commissioner has found that appellant has failed to discharge the *onus* which rested on him. In his reasons for judgment he states that it is not in accordance with custom for a woman to be married as a " seed-bearer " to another unless the latter is barren or is past the age when she might reasonably be expected to bear children and that on this point the evidence is unsatisfactory and contradictory.

In the case of *Mhlontlo* v. *Mhlontlo* (3 N.A.C., p. 114), the PRESIDENT stated: " At this time he had already had a Great wife, Marili, daughter of the Gcaleka chief Kreli, who was still a young woman and bearing children. This being so, there was no necessity at the time for a ' seed-bearer ' who is never instituted until the woman to be assisted has ceased to bear children."

It is argued on behalf of the appellant that the rights of the parties were acquired under Tembu custom and that such custom should have been applied. In the opinion of the Court this contention cannot be upheld. The late Matilose was domiciled in Pondoland when he married his Great and Right hand wives and continued to reside in Pondoland for many years thereafter. Pondo law and custom must, therefore, apply to these unions, and the position is not altered by the fact that the union with Mayobe was contracted in Tembuland .

The appeal is dismissed with costs.

MATUBENI DINWAYO v. VULINDLELA DINWAYO.

(LUSIKISIKI.)

1929. *August* 13. Before J. M. YOUNG, President, R. H. WILSON and F. C. PINKERTON, Members.

Wives, ranking of.—Pondo custom.—Paramount chief has right to nominate Great wife.—In all other cases the first wife is the Great wife.

FACTS: Appeal from the Native Commissioner's Court, Tabankulu. Further facts appear from the judgment.

Held: The parties to this suit are sons of the late Dinwayo Gxididi, chief of the "Amatlane" clan of the Amapondo tribe. Dinwayo, during his lifetime, married several wives, three of whom were: Masiyama, Macwera and Madanisilanga. Plaintiff is the eldest son of Masiyama, and defendant a son of Madanisilanga. Plaintiff claims a declaration that he is the eldest son of the late Dinwayo in his first or Great house, and as such entitled to inherit his father's estate. He alleges that his mother, Masiyama, was the first woman married by Dinwayo; and, that being so, she was the Great wife. He says that Macwera was the second wife and Madanisilanga the 19th wife of his father.

Defendant, on the other hand, says that Macwera, a daughter of the royal blood of the "Amacwera" clan, was the first, Masiyama the second, and Madanisilanga the fifth wife of Dinwayo, and, that as there was no male issue in Macwera's hut, he was adopted into or placed in her hut and instituted as heir of that hut by his father.

A considerable amount of evidence was led on both sides and the Native Commissioner has found on that evidence that the first woman the late Dinwayo married was the plaintiff's mother, Masiyama, and following the decision in the case of *Masipula* v. *Masipula* (4 N.A.C., p. 373), has declared the plaintiff to be the eldest son and heir of Dinwayo and entitled to inherit his estate.

During the course of the defendant's case an endeavour was made to prove that Madanisilanga, defendant's mother, was married by Dinwayo as the "isinye" or "womb" of Macwera's house, but the evidence on this point is contradictory and unsatisfactory. Furthermore, such an act would be unnecessary and not in accordance with custom for, at the time of Dinwayo's marriage with Madanisilanga, Macwera was a comparatively young woman and had two sons living. It was also attempted to show that because Macwera was the daughter of a chief she was given precedence over the other women of the kraal and treated by Dinwayo as his senior wife, she must be regarded as the Great wife.

As already stated the Native Commissioner has found as a fact that Masiyama was the first woman to become a wife of Dinwayo. In the opinion of this Court the evidence supports that finding. Accordingly, it is immaterial whether Macwera was regarded or nominated by Dinwayo as his Great wife or whether defendant is the son of a "seed-raiser" to Macwera or whether he was adopted into or placed in her hut and instituted as heir to that hut.

In the case of *Sigidi* v. *Lindiuriwa* (1 N.A.C., p. 55), it was laid down, after consultation with some of the leading authorities on Pondo custom, that the first wife of a minor chief or the chief of a clan or section of a tribe is the Great wife and her eldest son the heir to the chieftainship. In the case of *Maliwa* v. *Maliwa* (2 N.A.C., p. 193), the Native Assessors stated: "It is not competent for a husband during the life-time of his wife, and she having a son living at the time, to put another woman into the house to replace such wife or bear children for her." In the case of *Ntabankulu Mhlontlo* v. *Charles Mhlontlo* (3 N.A.C., p. 114), the PRESIDENT stated that a "seed-bearer" is never instituted until the woman to be assisted has ceased to bear children and that an heir cannot be disinherited without reasonable cause such as serious misconduct or unfitness for the position, and, the fact that a son, other than the eldest son of the Great House, has been nominated as heir cannot deprive the latter of his rights as heir to such house.

The case of *Nobulongwe* v. *Makawini* (4 N.A.C. 373) where the circumstances were somewhat similar to these in the present case, laid it down fairly definitely that according to Pondo custom the only person who has the power to nominate his Great wife is the Paramount chief and in every other instance the first wife married is the Great wife and her eldest son the heir.

With regard to the ruling of the Native Commissioner concerning the cross-examination of plaintiff's witnesses relative to the treatment accorded to Macwera by the clan, this Court is of opinion that the evidence which it was sought to elicit is irrelevant and that no prejudice has resulted by its exclusion.

The appeal is accordingly dismissed with costs.

(Kokstad.)

1929. *August* 20. Before J. M. Young, President, H. E. Grant and E. G. Lonsdale, Members.

Estates, administration and distribution of.—Enquiry under Act 38 of 1927, *section* 23 (4), *and Government Notice No.* 2257 *of* 1928.—*Writ, irregular issue of.*

Facts: Appeal from the Native Commissioner's Court, Mount Frere. Further facts appear from the judgment.

Held: On the 9th January, 1929, Matshalaza and Mamdingezweni, widows of the late Gabu, instituted an enquiry before the Native Commissioner at Mount Frere in terms of sec. 23 (4) of Act 38 of 1927 into the alleged mal-administration of Gabu's estate by appellant, and an order in the following terms was made: "It is ordered that Isaac Sodwele (the defendant) remain the guardian of the estate and issue of the late Gabu. All the property, viz., 87 sheep now in Bizana and 11 head of cattle at Magabu's kraal, must be brought to the kraal of the late Gabu and there remain under the guardianship of the defendant. It is further ordered that the boy Fukula be brought to the kraal of the late Gabu and remain there with his mother under the guardianship of Isaac Sodwele. All costs to be paid out of the estate, in accordance with the tariff laid down in Proclamation No. 145 of 1923."

On the 11th April, 1929, Mr. Attorney Kidney, acting on behalf of the widows, caused a writ of execution to be issued in terms of the order. On the 18th of that month an application was made to the Native Commissioner's Court to set aside the writ. This application was refused with costs and against this decision an appeal is brought.

In his reasons for refusing to grant the application the Native Commissioner states that he has no jurisdiction to set aside the writ, as such an order would have the effect of upsetting the judgment of a competent Court. In making this statement the Native Commissioner has overlooked the provisions of sec. 45 of Proclamation No. 145 of 1928, which empowers this Court to set aside or stay any warrant of execution issued by it on good cause shown.

The original dispute was submitted to the Native Commissioner for determination under sec. 23 (4) of Act 38 of 1927, but the procedure prescribed by the regulations published in Government Notice No. 2257 of 1928 does not appear to have been observed. Sec. 1 of these regulations provides that the Native Commissioner shall, on a complaint being lodged with him, summon before him all the parties concerned and such witnesses as he may consider necessary and summarily and without pleadings hear the evidence and determine the issue. The parties to the dispute have been regarded as plaintiff and defendant. In the opinion of this Court they should not have been so treated.

Although the regulations provide that the procedure to be followed in conducting the enquiry shall be that laid down in the Rules for Courts of Native Commissioners, there is nothing in them which authorizes or empowers the Clerk of the Native Commissioner's Court to issue a writ or warrant of execution to enforce the Native Commissioner's finding. If this finding is not complied with the correct course for the person or persons in whose favour it was made to follow would be to institute an action for a declaration of rights.

For these reasons this Court has come to the conclusion that the issue of the warrant of execution was irregular. The appeal is allowed with costs and the Native Commissioner's judgment altered to read: "It is ordered that the warrant of execution issued on the 10th April, 1929, be set aside and that the costs of the application be paid by the respondent."

(KOKSTAD.)

1929. *August* 20. Before J. M. YOUNG, President, H. E. GRANT and E. G. LONSDALE, Members.

Appeal.—Practice.—Government Notice No. 2254 of 1928.—Grounds of must be explicitly stated.

FACTS: Appeal from the Native Commissioner's Court, Matatiele. Further facts are immaterial.

HELD: The appeal in this case was noted " on the ground that the utmost the Court should have granted was an absolution judgment with costs, and not a final judgment against plaintiff."

An application by appellant's attorney was made to this Court for leave to file an amended Notice of Appeal, particulars of which were lodged with the Registrar two days before the commencement of the session. Sec. 10 of the Rules published under Government Notice No. 2254 of 1928 provides that a Notice of Appeal shall state:—

(*a*) whether the whole or part of the judgment is appealed against and (*b*) the grounds of appeal clearly and specifically.

Amongst the objects to be served by this rule are:—

(1) That the Native Commissioner may be enabled to frame his reasons for the judgment in terms of Rule 12.

(2) That the respondent might be enabled to abandon the whole or part of the judgment in his favour.

(3) That the respondent's legal advisers might be informed of the case which they must be prepared to meet.

(4) That this Court might be made aware beforehand of the points raised in appeal.

In the present case no *bona fide* attempt was made in the original Notice of Appeal to comply with the Rule and no grounds have been advanced to justify this Court in granting the indulgence asked for. Consequently the application must be refused.

The original Notice of Appeal is not in order, and as it does not meet the requirements of the Rule, the case is struck off the roll with costs.

(Umtata.)

1929. *August* 23. Before J. M. Young, President, W. J. Davidson and G. N. B. Whitefield, Members.

Marriage.—Christian rites.—Dowry.—Remarriage of widow.—Recovery of dowry paid by first husband.

Facts: Appeal from the Native Commissioner's Court, Engcobo. Further facts appear from the judgment.

Held: The plaintiff in this case sues the defendant for ten head of cattle or their value £50. In his particulars of claim he alleges that his son married the defendant's daughter by Christian rites in February, 1927, and that 12 head of cattle were paid as dowry; that about the month of July, 1927, his son died and that his widow has remarried.

The defendant in his plea admits that his daughter married the plaintiff's son, and that her husband died shortly after marriage, and states that only eleven head of cattle were paid as dowry. He admits further that she has contracted a second marriage, and say that such second marriage was by Christian rites, that it was entered into without his knowledge and consent, and that no dowry has been paid in respect thereof. He contends that as no dowry was paid in respect of the second marriage, and as no union according to Native customary forms was contracted, the dowry paid in respect of the first marriage is not returnable.

In the case of *Mgqongo* v. *Zilimbola* (3 N.A.C., p. 186), the President stated:—" It was at one time the practice in the Courts of these Territories to hold that under native custom a woman's marriage is not cancelled by the death of her husband, and to give an order for the return of the dowry paid for her, or a portion of it, should she abandon her husband's kraal after his death and refuse to return to it; this practice, however, ceased after the decision of the E.D.C. in the case of *Mbono* v. *Manxoweni* (6 E.D.C. 62) in which the principle was enunciated that not only is a marriage dissolved by the death of one of the parties to it, but that a widow is no longer under the control of any one and may go where she wishes and the return of dowry may not be ordered if she refuses to return to the kraal of her late husband. A new

element was thus introduced into cases of this nature, and this Court, following upon this decision of the E.D.C., has upon various occasions held that upon the death of a married man the marriage is dissolved and his widow is free to remarry; and it is only in cases where a widow has contracted a second marriage and a second dowry has been paid for her that this Court has held that the first dowry should be returned. This is done, however, not to mark the dissolution of the marriage, but on the principle that no man may hold more than one dowry in respect of one woman."

In the present case although the woman has remarried, there is nothing to show that the defendant has received a second dowry for her. Accordingly the plaintiff is not entitled to recover the first dowry. This ruling is in conflict with that in the case of *Ntlongweni* v. *Mhlakaza* (3 N.A.C. p. 163). In that case the Court appears to have lost sight of the principle underlying the question of the return of the dowry as enunciated in the case of *Mgqongo* v. *Zilimbola*, and previous decisions of the Transkeian Territories Native Appeal Court.

The appeal is allowed with costs and the Native Commissioner's judgment altered to absolution from the instance with costs.

GIDI MJONGILE v GILBERT MAKOMA.

(Kingwilliamstown.)

1929. *November* 1. Before J. M. Young, President, E. D. Beale and C. P. Alport, Members.

Appeal.—Practice.—Government Notices Nos. 2253 and 2254 of 1928.

Facts: Appeal from the Native Commissioner's Court, Lady Frere. Further facts appear from the judgment.

Held: The respondent, plaintiff in the Native Commissioner's Court, sued the appellant for the sum of £15 as damages for the wrongful destruction of a dwelling.

On the case being called the appellant's attorney filed a request for further particulars. The Native Commissioner disallowed the

application and ordered a plea to be filed. The appeal is against this ruling.

Now the first question which arises is whether this ruling of the Native Commissioner's Court is an appealable one. In our opinion it is not. It in no way disposes of a definite portion of the case, nor does it cause any prejudice to the appellant or have a direct effect on the final issue. The particulars of claim were set out with sufficient clearness to convey to the appellant what he had to meet. He should have answered the summons and allowed the action to proceed. If it continues he may still succeed, and the needlessness of these proceedings would then be obvious.

The purpose of the Act and the Regulations framed thereunder was to provide simple, expeditious and inexpensive machinery for the settlement of disputes between natives, and an appeal such as this, which is brought on a technical point of no apparent importance, seems scarcely to have been contemplated.

The appeal is dismissed with costs.

JOHANNI MBELEMBELE v. NDELENI DALIWE.

(Butterworth.)

1929. *November* 7. Before J. M. Young, President, D. S. Campbell and F. E. G. Munscheid, Members.

Pound regulations.—Damages.—Wrongful impounding of stock.

Facts: Appeal from the Native Commissioner's Court, Butterworth. Further facts appear from the judgment.

Held: On the 21st June, 1929, the appellant's donkey trespassed in the respondent's land on which crops were growing. Respondent notified appellant of the trespass and demanded damages. Appellant refused to pay and made no tender. An informal examination of the land was made by certain men in the absence of appellant and the damages assessed at 8s. The donkey was then impounded and subsequently released by appellant on payment by him under protest to the pound master of the sum of 16s. 3d.

made up as follows: 8s. damages, 4s. driving fees, and 4s. 3d. pound charges. Appellant then sued respondent in the Native Commissioner's Court for £5 damages alleged to have been suffered by him by reason of the wrongful and unlawful impounding of the donkey. He based his claim on the ground that he had tendered the sum of 1s. which was all that was due and that the tender was not accepted. Respondent denied that any tender was made and refused and claimed in re-convention the sum of 5s. 6d., which he alleged he had been underpaid in respect of driving fees.

Appellant admitted that 9s. 6d. was the correct amount payable in respect of driving or mileage fees. He denied liability therefor and said that even if the impounding was lawful the respondent had been overpaid. The Native Commissioner found that the donkey had been lawfully impounded, that 8s. was a reasonable amount to claim as damages, that 9s. 6d. was the correct mileage charge and awarded respondent a further sum of 5s. 6d.

The appeal is against this judgment and is brought on the grounds that it is against the weight of evidence and that, as respondent did not comply with the provisions of the pound regulations, his action was unlawful and that even if it was lawful, respondent has been overpaid.

Now as already stated, the facts as disclosed by the evidence clearly show that no tender was made. This being so, the respondent did not act unlawfully in impounding the donkey. It is true that he failed to observe the provisions of secs. 28, 32, 33 and 34 of Proclamation No. 387 of 1893, but in our opinion his non-compliance therewith and the action of the pound master in exacting an amount in excess of what was due did not make the impounding unlawful, and we have come to the conclusion that the appellant cannot succeed on the claim as formulated in the present summons. It would seem on the authority of *Friedman* v. *Davidson* (C.P.D. 1913, p. 223); *Cape Town Corporation* v. *Jorgensen* (C.P.D. 1920, p. 479), and *Mpondo* v. *Schultz* (E.D.L. 1920, p. 339), that his correct course would have been to claim a refund of the amount deposited under protest with the pound master.

The appeal is dismissed with costs.

(Butterworth.)

1929. *November* 7. Before J. M. Young, President, D. S. Campbell and F. E. G. Munscheid, Members.

Succession.—Institution of heir.—Appointment of son of Right hand house as heir of Great house.

Facts: Appeal from the Native Commissioner's Court, Nqamakwe. Further facts appear from the judgment.

Judgment: The plaintiff and defendant are sons of the late Dyantyi Sonti by his wife Nomhlaba. The plaintiff, who is the younger son, claims a declaration that he is the heir of the Great and Qadi houses of his father. He alleges that (1) the late Dyantyi Sonti had three wives: the Great wife; the Right hand wife, and the Qadi of the Great wife; (2) that there were two daughters, Qanqu and Motiwe, and no sons in the Great house; two sons, of whom the defendant is the elder, and three daughters in the Right hand house, and four daughters and no sons in the Qadi; (3) that Qanqu, one of the daughters of the Great house married; and, that during the subsistence of her marriage, she gave birth to an illegitimate son named Alven, who died about seven years ago, leaving no male issue; (4) that Qanqu's husband gave Alven to the late Dyantyi Sonti who placed him in his third or " Qadi " house as a son of that house; (5) that shortly after his marriage with his third or " Qadi " wife the late Dyantyi Sonti placed him, plaintiff, in his Qadi house and nominated him as heir of that house as well as of the Great house, and that by reason of his having been so nominated he is entitled to succeed to both these houses and to the estate of the late Alven..

The defendant denies that the plaintiff and he are sons of the Right hand house and states: (*a*) that his father, the late Dyantyi, had two wives only, viz., Nomhlaba, the Great wife, and Nomahini, the Right hand wife, that he and plaintiff are sons of the Great wife and that he is the elder; (*b*) that Motiwe and Qanqu are the illegitimate daughters of a woman with whom the late Dyantyi cohabited in the Cape Province before he married the mother of the parties; (*c*) he admits that Alven is the illegitimate son of Qanqu, that he was given to the late Dyantyi Sonti, that he had two daughters and that he died seven years ago. He denies that he

was placed in the Qadi house as a son and says that he was adopted into the house of Nomhlaba, the Great wife. He denies that plaintiff was placed in any house other than the one in which he was born and that he was instituted as heir of any house.

He claims in reconvention 8 head of cattle, 45 sheep and one horse or their value £91 15s., and says that Alven died without male issue before Dyantyi; that plaintiff succeeded to his estate, that Dyantyi on his death left 8 head of cattle, 45 sheep and one horse, made up as follows: 15 sheep and 1 horse, Alven's estate; 3 cattle and 15 sheep, progeny of the dowry of Nonkinqa, the eldest daughter of Nomahini, and 5 cattle and 15 sheep, the progeny of the dowry of Nobantu, the second daughter of Nomhlaba. He says further that he is prepared to leave with Nomahini, who is living at the kraal of the late Dyantyi, the 3 cattle and 15 sheep, the progeny of the dowry of her daughter, which are the property of her house.

The plaintiff, defendant in reconvention, denies defendant's (plaintiff in reconvention) claim and says that Dyantyi died four years ago, leaving 10 sheep and 4 cattle, belonging to the house of Nomahini and that the stock now numbers 2 cattle and 19 sheep. He claims to be the owner of this stock as heir of the Great and Qadi house.

After hearing evidence at some length the Assistant Native Commissioner entered judgment for the plaintiff in convention on the claim in convention, and for the defendant in reconvention on the claim in reconvention. The appeal is on the judgment in convention only.

Now the fundamental principle underlying the native law of succession is primogeniture. On the death of a native his estate devolves on his eldest son or his eldest son's eldest male descendant. If the eldest son has died leaving no male issue, the next son or his eldest male descendant inherits, and so on through the sons respectively. If the deceased was a polygamist, the eldest son of each house would succeed to the property appertaining or allotted to that house. In default of male issue in the First or Great house, the eldest son of the Second or Right hand house would succeed not only to the property of the house in which he was born, but also to the property of the First or Great house, unless there was male issue in the Third or Qadi house in which case, except under Pondo law and custom, the eldest son of the

Qadi house or his eldest male descendant would succeed to the property of both the Great and Qadi houses.

In the present case it is admitted that Nowanti, the mother of Motiwe and Qanqu, had no sons and this Court is satisfied that she was the wife and not the mistress of the late Dyantyi Sonti. It is also admitted that the defendant is the eldest son in order of rank of Dyantyi. It follows, therefore, that he would be the heir of Dyantyi and through him the heir of Alven, whether the latter was adopted into Nomhlaba's house or that of Nomahini in which there was no male issue.

The crux of the whole position rests on the question whether it was competent for Dyantyi to institute the plaintiff as heir to the principal or Great house and thus oust the defendant without first disinheriting the latter in a constitutional way.

The Native Assessors having been consulted state that under the circumstances disclosed it was not competent for the late Dyantyi to appoint the younger son of the Right hand house as heir to the Great house. This Court concurs in this expression of opinion. Even if native custom did permit of such an act on Dyantyi's part, the plaintiff has failed to prove that he did so. Furthermore, the assertion of the plaintiff that he was designated as heir of the house of Nomahini at a time when she was a comparatively young woman and not past the age of child-bearing is most improbable and inconsistent with native custom.

The appeal is allowed with costs and the Assistant Native Commissioner's judgment altered to judgment for defendant with costs.

(Umtata.)

1929. *November* 13. Before J. M. Young, President, O. H. Blakeway and E. L. Bowen, Members.

Appeal.—Noting of.—Condoning of an irregularity.

Facts: Appeal from the Native Commissioner's Court, Umtata.

Judgment: This is an application to condone an irregularity in the noting of an appeal which the applicant proposes to bring in an action which was heard in the Native Commissioner's Court. Judgment was given on the 29th August, 1929, and in terms of the rule the applicant had 21 days in which to note an appeal. The time for noting expired, therefore, on the 19th September. It appears from the application, which is dated 25th September, 1929, that the failure to observe the rule was due to carelessness or negligence on the part of the applicant's attorney. Reference to Rule 6 of the Native Appeal Court Rules, which prescribe the period within which an appeal shall be noted, shows that the Court of Appeal may extend such period upon just cause being shown.

In the case of *Reed* v. *Freer* (C.P.D. 1920, p. 250), it was laid down that "the Court will be careful to see, in each instance, that there must be some reasonable ground for the exercise of its discretion in favour of the appellant, and that the matter cannot be treated as a matter of course, that simply by asking leave of the Court, leave will at once be granted. Parliament having left it to the discretion of the Court in each instance, it follows that some ground must be shown on which the Court can judge in the exercise of such discretion."

In the present case the Court is of opinion that the mere statement in the application of the applicant's attorney that he omitted to note the appeal within the time prescribed, is not a reasonable ground for the exercise of its discretion in his favour, and that just cause has not been shown. To hold otherwise would undoubtedly lead to laxity and be contrary to the will and spirit of the Legislature.

The application is refused with costs.

(Lusikisiki.)

1929. *November* 18. Before J. M. Young, President, R. H. Wilson and C. H. B. Garner, Members.

Marriage.—Children born of customary union contracted during subsistence of marriage by Christian or civil rites.—Custody and guardianship of.

Facts: Appeal from the Native Commissioner's Court, Bizana.

Judgment: The appellant, defendant in the court below, was sued by respondent for a declaration of rights in respect of five children. In his particulars of claim he alleges:—

(1) That he is the brother and guardian in native law of a woman named Ida.

(2) That the appellant, who is a married man according to the forms of European marriage, caused the pregnancy of his sister, that she bore a female child and that five head of cattle were paid as damages for the seduction and pregnancy.

(3) That thereafter appellant took Ida from her people's kraal and has lived in adultery with her ever since.

(4) That four children were born of this adulterous union.

The appellant pleaded that he married Ida by native customary forms, that he paid nine head of cattle and £9 to her father and that, at the time this union was entered into, he had a wife named Elizabeth to whom he was married by Christian rites. He claimed:—

(*a*) That, if it was held that the union with Ida was lawful, he is the guardian of her children;

(*b*) that if it was held that the union was illegal he, having paid cattle to her father, is entitled to the custody and guardianship of the children;

(*c*) that if prayer (*b*) was not upheld then as respondent and his father were parties to the illegal union, his action arises *ex turpi causa* and he is estopped from recovering by action at law.

Respondent denied that any customary union was entered into by appellant and Ida and that he or his father were consenting parties to the cohabitation of Ida with appellant. He excepted to the plea on the ground that it discloses no defence inasmuch as

appellant having admitted that at the time of his alleged marriage by native customary forms with Ida, he was lawfully married by Christian rites to another woman.

The Native Commissioner upheld the exception and declared respondent to be the guardian of the children. Against this judgment an appeal is brought, firstly, that the plea does disclose a good defence as, if the allegations of fact contained therein are true—and they must be accepted as true for the purpose of deciding the action—the respondent (personally and through his father) was a party to the illegal union of Ida with appellant and consequently cannot obtain redress as his cause of action arises *ex turpi causa*. Secondly, that by the acceptance by respondent or his father of dowry for Ida, he forfeited any claim he might have had to her children, and thirdly, that in any event, the respondent, having admitted the receipt of five head of cattle for the pregnancy which resulted in the birth of the first child, has no claim to her.

Now, the issues which the Native Commissioner had to determine resolve themselves into two simple questions:—

(1) Did the ties between appellant and Elizabeth, consisting of a marriage according to Christian or civil forms, debar him from entering into a valid or binding union according to native customary forms with Ida?

(2) If not, did the cohabitation between appellant and Ida vest in him the guardianship and right to dowry of the children born as a result of such cohabitation.

On the first point, the Christian or civil marriage implied a contract between appellant and Elizabeth of exclusive cohabitation. Consequently, any intercourse on the part of appellant with Ida under the cloak of a native customary union would be adulterous and any children born as a result would be adulterine and illegitimate.

The answer to the first question, therefore, is that during the subsistence of his Christian marriage it was not competent for appellant to contract a valid union with Ida and the fact that respondent or his father accepted dowry acquiesced in the union, would in no way alter the position or have the effect of validating such union.

In regard to the second question there can be no doubt that the appellant is not the guardian of the children. As already stated, they are adulterine and illegitimate. In native law the illegitimate children of an unmarried woman belong to the house of which

she is a daughter, and on the death of her father the guardianship vests in his heir. Accordingly, this Court is of opinion that the Native Commissioner correctly upheld the exception and his judgment must be sustained.

The appellant's contention that the respondent, by accepting dowry or fine forfeited all claim he might have had to the children, cannot be supported. It is true that if Ida had deserted the appellant and he had sued for her return or the restoration of the dowry paid for her, he would not have succeeded on the ground that the contract was an immoral one and contrary to the principles of public policy.

The question in this case, however, is not whether the dowry is returnable, but the status of the children, and the fact that dowry or fine was paid for their mother cannot have the effect of legitimising them. They were born of intercourse whilst a lawful barrier existed which prevented any act on the part of either the appellant or respondent conferring on them the status of children born in lawful wedlock.

The appeal is dismissed with costs.

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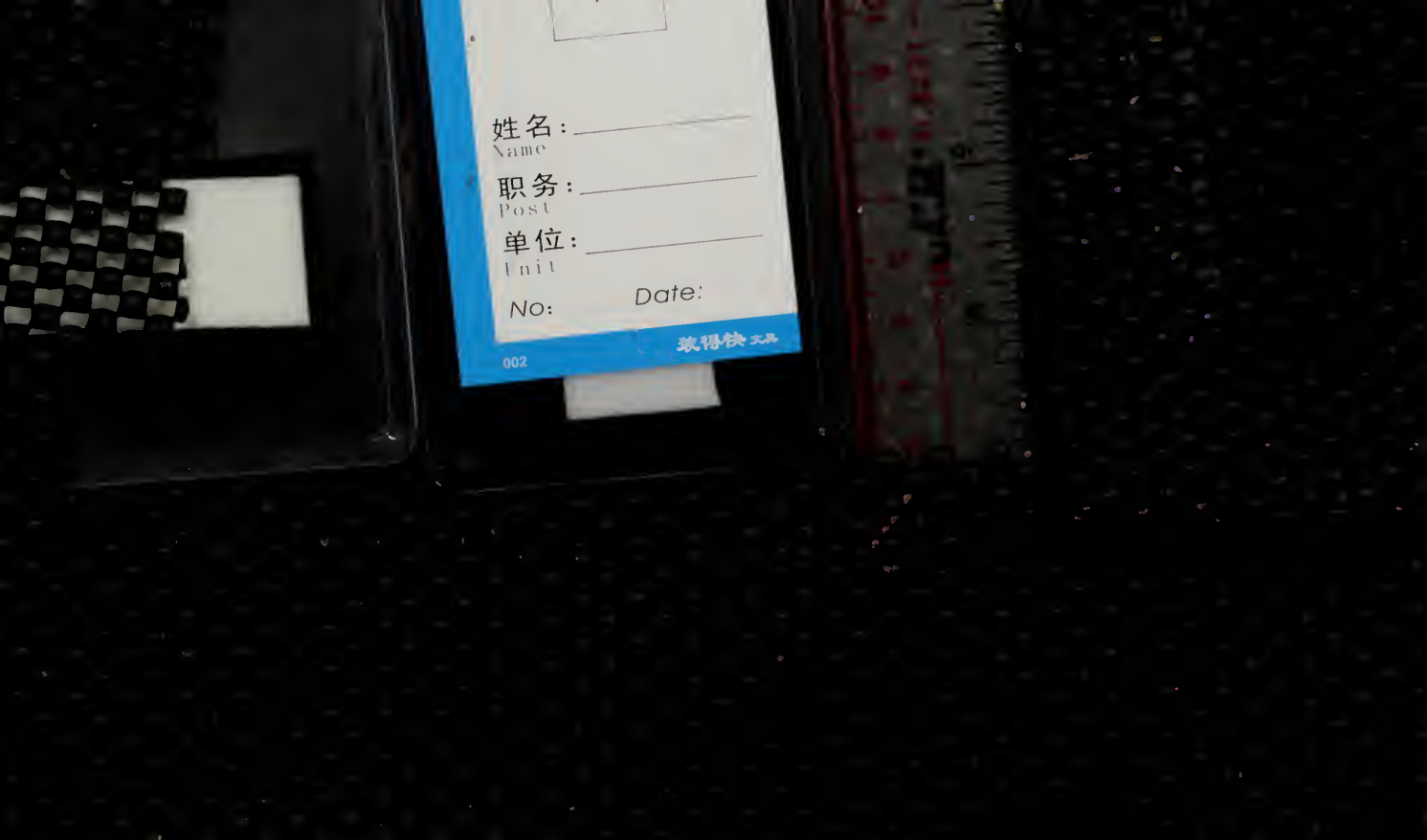
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